Office-Supreme Court, U.S.
FILED
JUN 12 1981
ALEXANDER L. STEVAS,
CLERK

80-2107

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GENERAL ATOMIC COMPANY, *Petitioner.*

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

NATHAN LEWIN
(*Counsel of Record*)

MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400

JOHN D. ROBB
JOHN P. EASTHAM
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Albuquerque, NM

Of Counsel:

MONTGOMERY & ANDREWS, P.A.
Santa Fe, NM

GRAY, CARY, AMES & FRYE
San Diego, CA

HOWREY & SIMON
Washington, DC

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QUESTIONS PRESENTED

1. Whether this Court's mandates in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977), and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978), which held that a New Mexico State court is prohibited by the Supremacy Clause from "interfer[ing] with efforts by GAC to obtain arbitration in federal forums," permit the New Mexico court to vacate arbitration awards entered in California pursuant to arbitration sessions held in that State on the ground that judgments of the Santa Fe court entered before the arbitration was allowed to begin deprived the arbitrators totally of "jurisdiction" to proceed?

2. Whether this violation by the New Mexico State court of this Court's mandates should be reviewed by mandamus?

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General Atomic Company ("GAC")[1] hereby petitions for the issuance of a Writ of Mandamus to the Hon. James W. Musgrove, District Judge of the District Court for the First Judicial District, Santa Fe County, New Mexico, directing that court to vacate its opinion, decision and judgment filed on January 9, 1981 (Pet. App. A, pp. 1a-16a, *infra*).

OPINIONS BELOW

The opinion, decision and judgment of the District Court for the First Judicial District, Santa Fe County, New Mexico, filed on January 9, 1981 (Pet. App. A. pp. 1a-16a, *infra*), are not reported.

JURISDICTION

This Petition for a Writ of Mandamus seeks effectuation of this Court's prior mandates, which have again been violated by an order of the New Mexico State court dated January 9, 1981, invalidating awards obtained

[1] General Atomic Company is a partnership whose constituent partners are Gulf Oil Corporation and Scallop Nuclear, Inc. Scallop is a subsidiary of the Royal Dutch/Shell Group.

after an arbitration conducted in California pursuant to the Federal Arbitration Act.[2] The jurisdiction of this Court is invoked under 28 U.S.C. §1651(a) and Rule 26 of the Rules of this Court. See *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978); *Vendo Co.* v. *Lektro-Vend Corp.,* 434 U.S. 425 (1978).

This Petition is filed contemporaneously with a Petition for a Writ of Certiorari to the Court of Appeal for the State of California (Fourth Appellate District) in *General Atomic Co.* v. *United Nuclear Corp.,* No. 80-2106. That Petition also concerns the validity and enforceability of the arbitration awards entered in San Diego, California, following this Court's rulings in *General Atomic Co.* v. *Felter,* 434 U.S. 12 (1977), and *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 10 of the Federal Arbitration Act, 9 U.S.C. §10, provides:

> In either of the following cases the United States court in and for the district wherein the award was

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[2] At pp. 12-14, *infra,* we explain the reason why this Petition is being filed now and could not appropriately have been filed earlier.

made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT

This case concerns a dispute between General Atomic Company ("GAC") and United Nuclear Corporation ("UNC") over performance of a 1973 agreement to supply uranium in interstate commerce at contractually fixed prices. The agreement contained a clause whereby the parties agreed to arbitrate "any disputes . . . aris[ing] during the course of" the contract. The present Petition for Mandamus seeks an Extraordinary Writ to vacate a judgment by a New Mexico court which interferes unlawfully for a third time with GAC's arbitration rights under federal law and thus violates this Court's mandates in two prior cases involving judgments by the same State court.

1. This Court's Rulings.

By rulings of October 1977 and May 1978, this Court invalidated orders of the Santa Fe District Court which had first enjoined federal litigation and arbitration and had thereafter "stayed" an arbitration which GAC had initiated against UNC in San Diego, California. *General Atomic Co.* v. *Felter,* 434 U.S. 12 (1977) ("*Felter I*"); *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978) ("*Felter II*"). This Court held in *Felter I* that the Santa Fe court's April 1976 injunction was unconstitutional under the Supremacy Clause, and it held in *Felter II* that it was "inconceivable" that, after this Court's first ruling, the Santa Fe court again impeded GAC's "absolute right to present its claims to federal forums." 436 U.S. at 497. In *Felter II,* this Court re-emphasized that "the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever" and quoted the holding of *Felter I* that "[t]he right to pursue federal remedies" may not constitutionally be restricted by a State court. *Id.* at 496, 497. This Court directed that to comply with the mandate of *Felter I* the Santa Fe court's "stay" order should be "vacat[ed] or modif[ied] . . . to the extent that it places any restriction whatsoever upon GAC's exercise of its right to litigate arbitration claims in federal forums." *Id.* at 497-98.

2. The "Partial Award."

As a result of this Court's decision in *Felter II,* the arbitration which had been initiated by GAC following *Felter I* continued in San Diego, California. The Arbitration Panel, consisting of former Illinois Supreme Court

Justice Walter V. Schaefer, former Secretary of Labor W. Willard Wirtz, and Professor Julian H. Levi, received substantial legal briefs and heard three days of oral argument from both parties in San Diego on UNC's claim that the arbitration was barred because two judgments issued by the Santa Fe court while its unconstitutional injunction and stay were in effect were entitled to full faith and credit. On November 14, 1979, a majority of the Panel (Justice Schaefer and Mr. Wirtz) rejected UNC's argument in a 38-page Partial Award filed in San Diego. The Partial Award appears as Appendix K to the Petition for a Writ of Certiorari in *General Atomic Co.* v. *United Nuclear Corp,* No. 80-2106 (pp. 25a-54a). Thereafter, the Arbitration Panel scheduled hearings "on the merits" to begin in San Diego on Monday, June 16, 1980.

3. The "Final Award."

On Friday, June 13, the last working day prior to the scheduled hearing on the merits, UNC and its designated arbitrator, Professor Levi, advised the American Arbitration Association that they were withdrawing from the proceeding. After recessing for one week to give UNC an additional opportunity to rejoin the arbitration, Justice Schaefer and Mr. Wirtz presided over two weeks of hearings in San Diego, during which GAC was required to present its evidence-in-chief and to respond to the defenses which UNC had asserted. On September 12, 1980, the two remaining arbitrators entered a 48-page "Final Award" in San Diego sustaining GAC's position. The "Final Award" appears as Appendix L to the Petition for a Writ of Certiorari in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106, pp. 81a-124a.

4. GAC's Applications For Confirmation In California Federal And State Courts.

On the day that the Panel's Final Award was entered in San Diego, GAC filed an application for confirmation of the Partial and Final Awards in the United States District Court for the Southern District of California in San Diego, pursuant to the language of Section 9 of the Federal Arbitration Act, 9 U.S.C. §9, which authorizes a confirmation proceeding in "the United States court in and for the district within which such award was made." On October 24, 1980, that court dismissed the confirmation proceeding, holding that in the absence of an independent basis for federal jurisdiction Section 9 does not confer subject-matter jurisdiction on federal district courts to confirm awards issued under the authority of the Federal Arbitration Act.[3]

Immediately following the district court's order of dismissal, GAC filed an application for confirmation, again under Section 9, in the State trial court of general jurisdiction in the situs of the arbitration, San Diego, California. The trial court overruled UNC's initial objections, which were based principally on full faith and credit, and was prepared to consider the merits. The State appellate court intervened, however, prior to any ruling on the merits, and ordered that the proceeding be dismissed. That dismissal is the subject of the Petition for a Writ of Certiorari in No. 80-2106.

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[3] An appeal from that dismissal is pending in the Court of Appeals for the Ninth Circuit (*General Atomic Co.* v. *United Nuclear Corp.*, No. 80-5830), and oral argument was heard on June 2, 1981.

5. UNC's First And Second Petitions For Supplemental Relief.

UNC had, in the meantime, returned to New Mexico and sought invalidation of both the Partial and Final Awards in the Santa Fe District Court, whose prior judgments had been the subjects of *Felter I* and *Felter II*. UNC filed its First and Second "Petitions for Supplemental Relief" seeking to have the Partial and Final Awards vacated and declared void. It asserted that the arbitrators were prohibited from proceeding because of the doctrine of full faith and credit. It claimed that judgments of the Santa Fe court had foreclosed the issues presented in the arbitration even though those judgments had been issued in late 1977 and early 1978, while the illegal stay was in effect.

6. The Santa Fe Court's Decision.

The Santa Fe court requested the parties to file briefs stating their positions. GAC's brief objected to the State court's jurisdiction on the grounds, *inter alia*, that it conflicted with this Court's two rulings prohibiting State-court interference with GAC's federally guaranteed remedies and that it violated the Federal Arbitration Act's specific designation of the court which may confirm or vacate an arbitration award. (General Atomic Company's Brief in Opposition to Petitions for Supplemental Relief, pp. 34-52.)

On January 9, 1981, Judge James W. Musgrove[4] issued an opinion, decision and judgment rejecting these

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[4] Judge Musgrove had replaced Judge Edwin L. Felter, who had issued the orders involved in the earlier rulings of this Court. Judge Felter had been appointed to the Supreme Court of New Mexico, but was defeated in the elections held in November 1980.

objections (Appendix A, pp. 1a-16a, *infra*). In these rulings, the Santa Fe court held that "[t]he arbitrators had no jurisdiction to issue an award in the purported arbitration" (p. 13a, *infra*). The court based this conclusion on its ruling that its own prior judgment of December 27, 1977, which had denied a stay of the Santa Fe proceedings pending arbitration, was "entitled to full faith and credit by all courts and forums" (p. 13a, *infra*). That judgment, together with an April 4, 1978, judgment declaring the 1973 Supply Agreement void, both of which had been filed before the arbitration began and before this Court's opinion in *Felter II*, were said to have deprived the arbitrators of all authority except the "powers . . . to dismiss the proceedings" (p. 8a, *infra*).

The court brushed aside the contrary conclusions of Arbitrators Schaefer and Wirtz. Referring to their Partial Award, Judge Musgrove said (p. 7a, *infra*):

> By some unfathomable sophistry the two arbitrators concluded that all proceedings in the New Mexico District Court and the New Mexico Supreme Court after April 2, 1976, were void or to use their words, "corom [sic] non judice."

On the basis of these conclusions, Judge Musgrove granted the relief UNC sought — an order vacating "the purported award" of the arbitrators (pp. 15a-16a, *infra*).

REASONS FOR GRANTING A WRIT OF MANDAMUS

1. A New Mexico judgment which reaches out to a California arbitration, rules that the arbitrators had no "jurisdiction" to hear the dispute, invalidates the entire proceeding, and vacates the arbitrators' awards on the ground that pre-arbitration New Mexico judgments had deprived the arbitrators of all authority except "to

dismiss the proceedings" is as effective a denial of the right to assert arbitration claims in federal forums as the pre-arbitration injunction and "stay" which this Court disapproved in *Felter I* and *Felter II*. Just as the "stay" of December 16, 1977, was an unlawful violation of this Court's initial ruling, the latest ruling of the Santa Fe trial court, that decisions of the New Mexico courts issued before *Felter II* disabled the arbitrators from taking any action, is simply another means of interfering with GAC's federal right to pursue arbitration. It made the arbitration conducted pursuant to the Federal Arbitration Act an empty charade. This latest judicial decree thus violates both *Felter I* and *Felter II*.

The judgment of the Santa Fe court rests explicitly on the proposition that judgments of that court issued while GAC was unconstitutionally enjoined from pursuing arbitration under federal law were totally dispositive of GAC's right to arbitrate and that the arbitrators did not have the power to determine the *res judicata* effect of those judgments. The Santa Fe court ruled that as of April 4, 1978 — almost two months before *Felter II* was decided — the arbitrators had no authority or jurisdiction to do anything but dismiss GAC's arbitration demand.[5]

In *Felter I* this Court expressed concern that GAC would be "substantially prejudiced" in its effort "to fairly litigate the various claims arising from this complex action" if a State injunction barring recourse to federal forums were permitted. 434 U.S. at 17. The prejudice to GAC's right "to fairly litigate" is the same — indeed, it is made permanent — if the enjoining court

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[5] The Santa Fe court said that "any agreement to arbitrate no longer existed; it vanished, disappeared" (p. 6a, *infra*). It held that as of April 4, 1978, the date of its default judgment, "there was no contract. There was no agreement to arbitrate" (p. 6a, *infra*).

may invalidate the *result* of the federal proceeding on the basis of a judgment it entered while it was enjoining the arbitration. This Court held in *Felter I* that the "right to pursue federal remedies" may not be "restricted by a state court" through an injunction which prohibits access to the federal remedy. *Id.* at 18-19. It is inconsistent with that conclusion to permit the right to be "restricted by a state court" acting after the fact — *i.e.*, declaring invalid the *result* of the federal remedy entirely on the basis of a judgment entered while the federal remedy was illegally proscribed.

Felter II confirmed the proposition that *Felter I* was not meant to be an empty formality or a meaningless gesture. The Santa Fe court had tried to prevent GAC from arbitrating under federal law in San Diego by "staying" that arbitration on the ground that GAC had "waived" its arbitration rights. This Court held that this was "precisely" what had been prohibited by this Court's previous ruling. 436 U.S. at 496. And it articulated the scope of the conduct forbidden to the Santa Fe court — it may not "interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." *Id.*

The prohibition against "interference" was described broadly by this Court in *Felter II* (436 U.S. at 497; emphasis added):

> [W]e have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration *or for any other reason whatsoever.* GAC, as we previously held, has *an absolute right* to present its claims to federal forums.

That "absolute right" must encompass more than a charade of presenting legal arguments and evidence to powerless arbitrators. It surely includes the right to have an Arbitration Panel decide a preliminary legal issue such as *res judicata* and the right of judicial review and confirmation which *follow* the conclusion of the arbitration pursuant to the statutory scheme for review and confirmation provided by the Federal Arbitration Act. This was made explicit in *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), on which both *Felter* decisions relied.[6] In *Donovan*, this Court held, in the face of a claim that a federal suit was barred by *res judicata*, that "whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court [*i.e.*, the second forum] to decide." 377 U.S. at 412. By the same token, UNC's claim of *res judicata* and full faith and credit was for the arbitrators to decide, and the state court could not, without violating the mandates of *Felter I* and *Felter II*, deprive the arbitrators of the power to decide that question, either before or after the fact.

This Court made it plain in *Felter II* that it would not countenance any order of the Santa Fe court which "restrict[ed] GAC from pursuing its arbitration claims in other forums." 436 U.S. at 498, n.2. Yet the decision of

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[6] In *Felter II*, this Court quoted the holding of *Felter I* as follows (436 U.S. at 495-96, quoting 434 U.S. at 18-19; footnote omitted):

> "What the New Mexico Supreme Court has described as 'harrassment' is principally GAC's desire to defend itself by impleading UNC in the federal lawsuits and federal arbitration proceedings brought against it by the utilities. This, of course, is something which GAC has every right to attempt to do under Fed. Rule Civ. Proc. 14 and the Federal Arbitration Act . . . . The right to pursue federal remedies and take advantage of federal procedures and defenses in federal actions may no more be restricted by a state court here than in *Donovan* [v. *Dallas*, 377 U.S. 408 (1964)]. Federal courts are fully capable of preventing their misuse for purposes of harrassment."

the Santa Fe court is that its judgments of December 27, 1977, and April 4, 1978, had precisely that effect — albeit in delayed fashion.[7] Rather than forbidding the arbitration, the pre-arbitration, pre-*Felter II* judgments of the Santa Fe court allegedly doomed any arbitration to inevitable invalidity. It is again "inconceivable" that the Santa Fe court could have believed itself "free to again impede GAC's attempt to assert its arbitration claims in federal forums" (436 U.S. at 497) by reaching out in this manner to vacate an arbitration award on the asserted ground that the arbitration proceeding was a total nullity *ab initio*.

2. Upon the issuance of the judgment of the Santa Fe court, GAC filed a notice of appeal and is presently processing its appeal to the New Mexico Supreme Court on the issue presented in this Petition as well as on other issues of federal and State law. In view of the pendency in the California State courts of GAC's motion for confirmation of the arbitration awards (which is involved in the companion Petition for a Writ of Certiorari), GAC did not believe it was appropriate to impose immediately upon this Court the burden of rectifying, once more, the error of the Santa Fe District Court. If the California Supreme Court had reversed the decision of the California Court of Appeal, the arbitration awards would have been reviewed and, we believe, confirmed by the California trial court notwithstanding the decision of the Santa Fe court.[8]

[7] Both of these judgments had been called to the attention of this Court *before* the decision in *Felter II*. If the Santa Fe court were thereafter permitted to hold that arbitration was already foreclosed as of the time *Felter II* was decided, then truly the judgments of this Court would have been treated as "meaningless gestures." See Partial Award, Pet. App. K, Appendix to Petition for Writ of Certiorari, No. 80-2106, p. 47a.

[8] See also this Court's new Rule 27.2(a), which authorizes a writ of mandamus only if "the relief sought is not available in any other court."

The California Supreme Court has now refused to review the decision of the Court of Appeal. Consequently, this Court is being asked to consider the validity of the grounds given by the California Court of Appeal for its ruling. There is, therefore, no sound reason to delay this Court's review, under mandamus standards, of the related decision of the Santa Fe court. To be sure, the New Mexico Supreme Court has not yet rendered a decision on the question whether the trial court's judgment conflicts with this Court's earlier mandates. But as this Court observed in *Felter II*, 436 U.S. at 497:

> A litigant who, like GAC, has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court.

If, as we believe, the New Mexico courts were prohibited by *Felter I* and *Felter II* from voiding *ab initio* arbitrations conducted in other jurisdictions under the Federal Arbitration Act on the basis of pre-arbitration Santa Fe judgments, this Court should reaffirm that principle now and direct that the Santa Fe court's latest interference with GAC's pursuit of federal remedies be vacated. Moreover, the California Court of Appeal's mistaken reliance on New Mexico's pre-arbitration decisions as *res judicata* and its erroneous belief that the New Mexico courts are "more suitable forums" for determining the validity of the arbitration awards squarely puts in issue the validity of the decision of the Santa Fe court.[9]

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[9] It is plain from the language of Section 10 of the Federal Arbitration Act and from the decided federal cases that the New Mexico courts have no jurisdiction to vacate an award entered in California. See *City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182, *modified on other grounds*, 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974); *United States* v. *Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968).

The two cases are so closely related that it serves the needs of judicial economy for this Court to consider both cases together. This could be achieved if a writ of certiorari were granted in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106, and if this Petition were consolidated, for briefing and argument, with that case.[10]

CONCLUSION

The latest action of the Santa Fe court violates the mandates issued by this Court in *Felter I* and *Felter II*. It is closely related to the decision of the California Court of Appeal for the Fourth Appellate District which is challenged in *General Atomic Co.* v. *United Nuclear*

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[10] Judge Musgrove observed (p. 1a, *infra*):

> There is one thing that can be said of this case with a great deal of certainty. There will be no end until the issues are gathered together, presented to and decided by some court of last resort.

Corp., No. 80-2106. A writ of certiorari should be granted in that case, and it should be consolidated for briefing and argument with the present Petition.

RESPECTFULLY SUBMITTED,

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.,
Suite 500
Washington, D.C. 20037
(202) 293-6400

JOHN D. ROBB
JOHN P. EASTHAM
RODEY DICKASON, SLOAN, AKIN & ROBB, P.A.
Albuquerque, NM

Of Counsel:

MONTGOMERY & ANDREWS, P.A.
Santa Fe, NM

GRAY, CARY, AMES & FRYE
San Diego, CA

HOWREY & SIMON
Washington, DC

June 1981

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, ET AL, *Defendants,*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Third-party Defendants.*

Opinion

(Filed January 9, 1981)

This matter is before the Court on plaintiff's, United Nuclear Corp. (UNC), petition for supplemental relief pursuant to Section 9 of the New Mexico Declaratory Judgment Act, Section 44-6-9 N.M.S.A. 1978, and Section 10 of the Federal Arbitration Act 9 U.S.C. 10 seeking a declaration that the arbitration proceedings were barred by the earlier judgments of this Court and vacating the arbitration awards.

Defendant, General Atomic Co. (GAC), filed its response claiming that this Court lacks jurisdiction, improper venue, improper service and that the petitions fail to state a claim upon which relief can be granted.

There is one thing that can be said of this case with a great deal of certainty. There will be no end until all the issues are gathered together, presented to and decided by some court of last resort. For some time the case has been on parallel courses with the courts on one course and an arbitration panel on the other. This is the first time the courses have converged presenting an opportunity for its final trek to appellate review.

JURISDICTION. This Court has had jurisdiction of the parties and subject matter since December 31, 1975. On April 2,

1976, this Court denied GAC's motion to dismiss this action for lack of personal jurisdiction. On October 15, 1976, the New Mexico Supreme Court affirmed. *United Nuclear Corp.* v. *General Atomic Co.*, 90 N.M. 97, 560 P2d 161. That issue was final and became the law of this case. No claim of lack of subject matter jurisdiction was made since the District Court is a court of general jurisdiction and the dispute arose from a contract between the parties. Art. VI, Sec. 13 New Mexico Constitution. The parties agree that state courts and federal courts have concurrent jurisdiction under the Federal Arbitration Act. *Commercial Metals Co.* v. *Balfour, Guthrie & Co.*, 577 F. 2d 264 (5th Cir. 1978). This Court has jurisdiction in this case to apply the Federal Arbitration Act. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P2d 290, certiorari denied, 44 U.S. 911. That is the law of this case. This Court is bound by that law. The claim of lack of jurisdiction is without merit.

VENUE. This case was originally filed pursuant to the New Mexico Declaratory Judgment Act, Section 44-6-1 et seq. N.M.S.A. 1978. A judgment was entered by this Court on December 27, 1977. Section 8 of the Act mandates the Court to grant further relief based on a declaratory judgment when necessary or proper. Plaintiff has requested this Court for a declaration determining what, if any, effect the action of the arbitration panel has on the prior judgment. Venue is nothing more than the proper location of the forum to hear the case. It is a general rule that actions must be tried where brought unless the venue is changed. *Peisker* v. *Chaney*, 46 N.M. 159, 123 P2d 726. The same applies to supplementing a judgment previously entered. Venue is proper for consideration of further relief pursuant to Section 44-6-9 N.M.S.A. 1978.

Counsel have cited no cases directly stating that a state court considering affirmation or vacation of an arbitration award has to be in the district where the award was made nor have they cited any cases stating that it does not have to be in the district where the award was made.

Section 9 of the Federal Arbitration Act dealing with confirmation of the award states in part —

> "If no court is specified in the agreement of the parties then such application may be made to the United States Court in and for the district within which such award was made."

Section 10 of the Act dealing with vacation of the award states in part —

> "In either of the following cases the United States Courts in and for the district wherein the award was made may make an order vacating the award —"

GAC argues that only a court, Federal or State, in the Southern District of California where the purported arbitration occurred can affirm or vacate the award. An action was filed by GAC in the United States District Court for the Southern District of California to confirm the award. *General Atomic Co.* v. *United Nuclear Corp.*, Case No. 80-1585-E (Sept. 9, 1980). The case was dismissed for lack of subject matter jurisdiction. The case met the same fate in the United States District Court in New Mexico, *United Nuclear Corp.* v. *General Atomic Co.*, Civ. No. 80-845HB (December 11, 1980). GAC filed an application to confirm the award in the Superior Court for San Diego County, California. *General Atomic Co.* v. *United Nuclear Corp.*, Case No. 560547. The Fourth Appellate Division, California Court of Appeals dismissed the action in the Superior Court. *United Nuclear Corp.* v. *Superior Court of the State of California for the County of San Diego*, 4 Civ. No. 24286 (December 16, 1980). Judge Brown dismissed the case for lack of jurisdiction. Judge Brown also held the prior judgments and decisions of the New Mexico court were entitled to full faith and credit. Even if there had been no jurisdiction question that Court would have stayed the California case until this Court entered a judgment under the doctrine of forum non conveniens. As the matter now stands, if GAC's argument were correct, the arbitration award would remain in perpetual limbo. In Sec-

tions 9 and 10 of the Federal Arbitration Act the words "may be made" and "may make an order" are permissive rather than mandatory. Had Congress intended to restrict such action to a particular locale stronger language would have been used. *Allison, Inc.*, v. *Menikin Storage, Inc.*, 452 F. Supp. 573 (1878).

The venue of this Court to consider the arbitration award pursuant to the Federal Arbitration Act is proper.

SERVICE. Service of the petitions requesting supplemental relief and vacation of the arbitration award was made by mailing to opposing counsel in conformity with Rule 5 of the New Mexico Rules for Civil Procedure. The same parties and same counsel are now as they have been in the past. A plethora of pleadings have been enchanged in the same manner. GAC used the petitions as a basis for removal of this case to Federal Court which was then remanded. Counsel was frank to admit there was no real difference whether the petitions were handed to him by the postman or a marshal. To hold otherwise would be to elevate form over substance. Service was proper in this case.

FAILURE TO STATE A CLAIM. GAC argues that the petitions fail to state a claim upon which relief can be granted, to the extent that they seek review of the arbitration awards other than as contemplated by Section 10 of the Federal Arbitration Act.

In considering the motion to dismiss for failure to state a claim for which relief can be granted, all facts well pleaded must be accepted as true and the motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim. *Runyan* v. *Jaramillo*, 90 N.M. 629, 567 P2d 478.

The petitions clearly state the grounds of the claim for relief: that the arbitrators exceeded their powers or imperfectly executed them. The petitions also state factual and legal matters in support of those claims. If the matters pleaded in the petitions are accepted as true the plaintiff is entitled to the

relief requested. The claim of failure to state a claim is without merit.

THE ARBITRATION. A petition for a declaratory judgment on a contract between UNC and GAC was filed in this Court on December 31, 1975. On December 27, 1977, this Court entered a decision and judgment denying GAC's motion to stay proceedings and declared that GAC had waived any right it may have had to arbitration; that the issues of New Mexico antitrust violations were not arbitrable; that all other issues were so intertwined with the antitrust issue none were arbitrable. An interlocutory appeal was taken by GAC. On May 7, 1979, in *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P2d 290, the New Mexico Supreme Court affirmed the judgment as to waiver and nonarbitrability and held that the trial court's decision and judgment were not inconsistent with the two United States Supreme Court decisions, *General Atomic Co.* v. *Felter*, 434 U.S. 12 and 436 U.S. 493, arising out of this case. The United States Supreme Court denied certiorari. *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911.

On May 18, 1978, the New Mexico Supreme Court issued a mandate to this Court for such further proceedings as may be proper.

The issues of waiver, nonarbitrability and no inconsistency with the United States Supreme Court decisions were final, the law of the case, res judicata and entitled to full faith and credit by all other courts and forums. In *Ealy* v. *McGahen*, 37 N.M. 246, 21 P2d 84 (1933) the New Mexico Supreme Court in discussing res judicata stated the following:

> "Final judgments are conclusive as to the claim or demand in controversy as to the parties in the suit and those in privity with them, not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Public policy requires that there be an end to litigation and that rights once

established by a final judgment shall not again be litigated in any subsequent proceeding."

The very essence of GAC's motion to stay proceedings in this court was its claim that there was an agreement between the parties to arbitrate the dispute. The Court declared GAC had waived any right to arbitration. The legal effect of that declaration was that any agreement to arbitrate no longer existed; it vanished, disappeared.

On April 4, 1978, this Court entered a judgment declaring the contract between UNC and GAC to be void and unenforceable. That judgment was affirmed by the New Mexico Supreme Court on August 29, 1980. *United Nuclear Corp.* v. *General Atomic Co.*, _____ N.M. _____. That judgment is final, res judicata, and entitled to full faith and credit until and unless reversed by the United States Supreme Court. At least from April 4, 1978, there was no contract. There was no agreement to arbitrate.

Following this Court's denial of GAC's motion to stay proceedings, GAC initiated arbitration proceedings. GAC did not petition a court to compel arbitration, since there was no doubt UNC had refused to arbitrate, but requested the American Arbitration Association for arbitration. Other than by implication in its motion to stay proceedings in this court, GAC has never petitioned a court to compel arbitration. At GAC's request the American Arbitration Association started arbitration proceedings. UNC under protest appointed an arbitrator and participated in the preliminary proceedings until it became apparent that a majority of the arbitrators would not be bound by the New Mexico judgments and decisions. UNC withdrew from any further participation. The arbitrator appointed by UNC later filed a dissent to the action by the other arbitrators and resigned. The two remaining arbitrators then proceeded to do what the United States Supreme Court had refused to do — review and reverse the New Mexico Supreme Court decision of May 7, 1979. Congress has the power to constitute tribunals inferior to the United States Supreme Court. However, Congress by enacting the Federal

Arbitration Act did not intend nor would it have the power to create a tribunal superior to or even co-equal with the United States Supreme Court. By some unfathomable sophistry the two arbitrators concluded that all proceedings in the New Mexico District Court and the New Mexico Supreme Court after April 2, 1976, were void or to use their words, "corom non judice." They reached that conclusion even though there is not the slightest hint that the United States Supreme Court intended such a result in the prior opinions. *General Atomic Co.* v. *Felter,* 434 U.S. 12 (Felter I) and 436 U.S. 493 (Felter II).

The United States Supreme Court decisions were quite straightforward: a state court cannot deny a party access to federal forums. At the time of Felter II, the United States Supreme Court had before it the judgment of this Court declaring that GAC had waived its right to arbitration and that the issues were not arbitrable. The only fault the Supreme Court found with the judgment was the one part which interfered with GAC's right of access to a federal forum. At the time GAC petitioned the United States Supreme Court for a Writ of Certiorari, *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911, that Court had before it the decision of the New Mexico Supreme Court affirming the judgment declaring waiver and nonarbitrability and the holding there was no inconsistency with the prior decisions of the United States Supreme Court in this case. Certiorari was denied. Common sense and respect for the United States Supreme Court dictates that had the Court believed all action in the New Mexico courts was void after April 2, 1976, they would have said so. To make the interpretation the arbitrators did would place the United States Supreme Court in a position of playing capricious games with the lower courts and litigants. This Court absolutely refuses to believe the United States Supreme Court would indulge in such conduct.

There is a vast difference between a right of access to a forum and a right to the relief sought in that forum. Neither of the parties could be denied access to the Federal District

Court for Southern California or New Mexico or the state court in California. However, having access did not carry with it the right to the relief sought as evidenced by the rather hasty empty handed exit. GAC's right of access to the arbitration forum did not, under the facts of this case, carry any rights to the relief sought.

On April 4, 1978, this Court entered a judgment declaring the contract between UNC and GAC to be void and unenforceable. From April 4, 1978, there was nothing to arbitrate. The arbitrators were aware of that judgment. On August 29, 1980, the New Mexico Supreme Court affirmed the judgment. The arbitrators were aware of that decision. Undaunted the arbitrators made a purported award on September 10, 1980, in favor of GAC. If not before, at least after April 4, 1978, all action taken by the two arbitrators was corom non judice.

Considering the totality of the action of the arbitrators, the judgments and decisions of the New Mexico Courts and the opinions of the United States Supreme Court an inescapable conclusion appears. The two arbitrators simply did not agree with the results reached by the New Mexico courts. They chose to ignore the courts and reach their own results. Such action at best was a heedless disregard for the fundamental principles of American jurisprudence.

By failing to give full faith and credit to the valid final judgments and decisions of the New Mexico courts which were res judicata as to these parties the arbitrators exceeded their powers. At least after the judgment of this Court, which was affirmed by the New Mexico Supreme Court, declaring there was no contract between the parties to arbitrate, the only powers in the arbitrators was to dismiss the proceedings. The arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made.

Plaintiff UNC is entitled to the relief requested in its petitions.

Some courts involved in this case have commented on the enormous costs for discovery and attorneys' services. There also have been enormous costs to the taxpayers in furnishing facilities, personnel from bailiffs to judges and mountains of paper logistics in the many courts this case has visited. Therefore this fervent prayer: Appellate Court, affirm, reverse or modify, but please do not remand.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, et al, *Defendants,*
INDIANA & MICHIGAN ELECTRIC COMPANY,
Third-party Defendants.

Decision

(Filed January 9, 1981)

This matter came before the Court on plaintiff's petitions for supplemental relief pursuant to the New Mexico Declaratory Act and the mandate of the New Mexico Supreme Court and to vacate the arbitration award pursuant to the Federal Arbitration Act.

The Court for its decision makes the following findings of fact and conclusions of law.

Findings Of Fact

1. On December 31, 1975, plaintiff, United Nuclear Corp. (UNC) filed an action for a declaratory judgment involving a contract between UNC and defendant, General Atomic Co. (GAC).

2. On April 2, 1976, this Court entered a judgment denying GAC's motion to dismiss for lack of personal jurisdiction.

3. On October 15, 1976, the New Mexico Supreme Court affirmed the judgment entered April 2, 1976, as to personal jurisdiction. *United Nuclear Corp.* v. *General Atomic Co.*, 90 N.M. 97. No further appeal was taken.

4. On November 29, 1977, GAC filed with the American Arbitration Association a demand for arbitration of the same dispute with UNC.

5. On November 30, 1977, GAC filed a motion to stay proceedings in this Court pending arbitration of the dispute.

6. On December 27, 1977, this Court entered a decision and judgment denying the motion to stay proceedings and declared that GAC had waived any right to arbitration, that the issues of violations of New Mexico antitrust laws were not arbitrable and that all other issues were so entertwined with the antitrust issues, none were arbitrable.

7. On May 7, 1979, the New Mexico Supreme Court affirmed this Court's decision and judgment of December 27, 1977, *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105 and also held there was no inconsistency between the United States Supreme Court decisions, *General Atomic Co.* v. *Felter*, 434 U.S. 12 and 436 U.S. 493.

8. On October 9, 1979, the United States Supreme Court denied certiorari to review the New Mexico Supreme Court opinion referred to in Finding No. 7, *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911.

9. On April 4, 1978, this Court entered a judgment declaring the contracts between UNC and GAC were null, void, unenforceable and of no effect whatever.

10. On August 29, 1980, the New Mexico Supreme Court affirmed this Court's judgment of April 4, 1978. *United Nuclear Corp.* v. *General Atomic Co.*, _____ N.M. _____.

11. Under protest UNC named an arbitrator and participated in the preliminary proceedings of arbitration until March 29, 1979.

12. On March 29, 1979, the arbitration panel announced it would not give full faith and credit to the New Mexico judgments and decisions. UNC withdrew from further participation. Thereafter the arbitrator appointed by UNC resigned.

13. Shortly after the entry of same this Court's decisions and judgments of December 27, 1977 and April 4, 1978 and the New Mexico Supreme Court opinions of May 7, 1979 and August 29, 1980 were furnished the arbitrators.

14. On September 10, 1980, the two remaining arbitrators issued an arbitration award in favor of GAC. *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation*, No. 73-10-0078-77.

15. The United States District Court for the Southern District of California has dismissed GAC's application and motion to confirm the arbitration award for lack of jurisdiction. *General Atomic Co.* v. *United Nuclear Corp.* Case No. 80-1585E.

16. The United States District Court for the District of New Mexico has declined to assist in the confirmation of the arbitration award or to interfere with this Court's proceedings on the petitions filed herein. *United Nuclear* v. *General Atomic Co.*, Case No. Civ. 80-845-HB.

17. GAC's application to confirm the arbitration award filed in the State Court of California has been dismissed by the California Court of Appeals.

18. GAC has never petitioned any court to compel arbitration.

19. No court has ever ordered arbitration of the dispute between UNC and GAC.

20. The United States Supreme Court opinions in *General Atomic Co.* v. *Felter*, 434 U.S. 12, and 436 U.S. 493 held only that this court could not deny nor interfere with GAC's right of access to the federal forum.

Conclusions Of Law

1. This Court has personal and subject matter jurisdiction in this cause for the purpose of granting supplemental relief under the New Mexico Declaratory Judgment Act and the Federal Arbitration Act.

2. The venue in this Court is proper for granting supplemental relief under the New Mexico Declaratory Judgment Act.

3. The venue in this Court is proper for vacating the arbitration award pursuant to the Federal Arbitration Act.

4. This Court's decision and judgment of December 27, 1977, declaring that GAC had waived its right to arbitration and that the issues were not arbitrable is a valid final judgment. The judgment is res judicata as to these parties and has been since December 27, 1977. The judgment is entitled to full faith and credit by all courts and forums.

5. The opinion of the New Mexico Supreme Court holding that there was no inconsistency between the United States Supreme Court decisions and the judgment of this Court is the law of this case. It is res judicata as to these parties and is entitled to full faith and credit.

6. The judgments of this Court of April 4, 1978, and May 17, 1978, are valid final judgments, declaring the contracts between the parties to be null, void and unenforceable.

7. At least as of April 4, 1978, there was no agreement between the parties to arbitrate their dispute.

8. The arbitrators had no jurisdiction to issue an award in the purported arbitration.

9. In failing to give full faith and credit to the judgments and decisions of this Court and the New Mexico Supreme Court the arbitrators acted in manifest disregard of the law.

10. The arbitrators exceeded their powers.

11. The arbitrators so imperfectly executed their powers that a mutual, final and definite award was not made.

12. Plaintiff is entitled to a supplemental judgment of this Court declaring that the judgment of December 27, 1977 is not affected by the purported award of the arbitrators because the action of the arbitrators was illegal, void and of no effect.

13. Plaintiff is entitled to a judgment of this Court vacating the purported award of the arbitrators as provided by Section 10 of the Federal Arbitration Act.

All requested findings of fact and conclusions of law not adopted herein are hereby refused.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, et al, *Defendants,*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Third-party Defendants.*

Judgment

(Filed January 9, 1981)

This matter came before the Court on plaintiff's petitions for supplemental relief pursuant to Section 9 of the New Mexico Declaratory Act and to vacate the arbitration award pursuant to Section 10 of the Federal Arbitration Act. The Court having considered the matters presented, having heard argument of counsel and having entered its decision, which by reference is made a part of this judgment, finds the plaintiff is entitled to the relief requested.

IT IS THEREFORE ORDERED AND DECLARED that the action of the arbitration panel and the purported award issued by the arbitration panel in *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation,* No. 73-10-0078-77, American Arbitration Association is illegal, void and of no effect on the judgment entered by this Court on December 27, 1977, and plaintiff is still entitled to all the rights, benefits and relief granted by that judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the arbitrators in *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation,* No. 73-10-0078-77 having exceeded their powers and having

so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made, the award is hereby vacated and held for naught.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

Office-Supreme Court, U.S.
FILED
JUL 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GENERAL ATOMIC COMPANY,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

BRIEF OF INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION

WHITNEY NORTH SEYMOUR
ALBERT X. BADER, JR.
Counsel of Record for Respondent Indiana & Michigan Electric Company
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

SIMPSON THACHER & BARTLETT
Of Counsel.

July 14, 1981

Question Presented

Should this Court exercise its mandamus jurisdiction to vacate a declaratory order and judgment of a New Mexico trial court that an arbitration award was a nullity where an appeal of that order and judgment to the New Mexico Supreme Court is in process and where the order and judgment were entered in aid of final judgments of the New Mexico Supreme Court, which this Court has refused to review, that Petitioner had waived its alleged right to arbitrate and that the agreement to arbitrate was void?

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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-2107

IN RE GENERAL ATOMIC COMPANY,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

BRIEF OF INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION

General Atomic Company ("GAC") has petitioned for a Writ of Mandamus ("Mandamus Petition") to the District Court of Santa Fe, New Mexico ("Santa Fe court") to vacate a judgment of District Judge Musgrove which declared that an arbitration award entered in favor of GAC against United Nuclear Corporation ("UNC") was void. Concurrently, GAC has moved that its Petition for a Writ of Certiorari to the California Court of Appeals (No. 80-2106) ("Certiorari Petition") seeking review of final judgments of the California courts dismissing GAC's application for confirmation of that arbitration award should be consolidated with the Mandamus Petition. Indiana & Michigan Electric Company ("I&M") opposes both the Mandamus Petition and the motion.[1]

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[1] The information required by this Court's Rule 28.1 appears in the Appendix to this Brief.

Statement of I&M's Interest

The Mandamus Petition makes not a single mention of I&M.[2] It asks this Court only to vacate Judge Musgrove's judgment voiding GAC's arbitration award against UNC. GAC took the position before Judge Musgrove that it did not, at this point, challenge the validity of the default judgment entered on behalf of I&M or the decision of the Santa Fe court on December 27, 1977 not to stay the trial of I&M's case pending arbitration. Transcript, Hearing before the Santa Fe court, December 23, 1980, at 191.[3]

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[2] I&M was never a party to the arbitration proceeding in California or to the California state court proceeding where GAC unsuccessfully attempted to have the arbitration award confirmed. Appropriately, GAC did not serve its Certiorari Petition on I&M. Any determination by this Court on the merits of the Certiorari Petition would not properly involve I&M's interests.

[3] Indeed, one of GAC's counsel effectively conceded that it could not base any attack on I&M's judgment on a claim that it was improperly denied a right to arbitrate effectively:

> So far as I&M is concerned . . . I don't know whether the injunction against arbitration affects the rights with regard to I&M. I'm not trying to make any final statement now and, frankly, I haven't thought through the question of whether it affects I&M; but I would think there's certainly an argument that since there were no arbitration rights vis-a-vis I&M that General Atomic had, that the injunction against arbitration and forestalling GAC from proceeding with arbitration with regard to UNC was not prejudicial with regard to I&M.
>
> * * *
>
> The reason that the court thing is illegal is that the court assumed jurisdiction when it did not have exclusive jurisdiction. So that's really what made it unlawful with regard to GAC and UNC.
>
> But with regard to General Atomic Company and I&M, that assertion could not be made because there was no arbitration.

Transcript, Hearing before the Santa Fe court, December 23, 1980, at 180-81. Nevertheless, a second GAC attorney subsequently tried to preserve such a claim. *Id.* at 190-91.

In view of GAC's concession, we would ordinarily regard the Mandamus Petition as irrelevant to I&M. I&M is not a party to any arbitration agreement and its rights are not challenged or properly involved in either petition. GAC, however, has heretofore urged this Court that if it be held that GAC preserved its rights to arbitration, all proceedings in the New Mexico courts subsequent to April 2, 1976 are void, including I&M's judgment.[4] Although this Court has refused to review these meritless claims, *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911 (1979), denying certiorari, and 101 S.Ct. 1966 (1981), dismissing the appeal and denying certiorari, GAC, having again tried to preserve these claims (*see* Transcript, Hearing before the Santa Fe court, December 23, 1980, at 190-91), has employed such sweeping language in its Mandamus Petition, at 5, 7 and 9, as to suggest that it might try to use this proceeding to undercut I&M's judgment as well as UNC's.

ARGUMENT

GAC asks this Court to determine summarily, by mandamus, that the order of the Santa Fe court nullifying the arbitration award which was entered in aid of the judgment

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[4] The Brief of I&M in Opposition in *General Atomic Co.* v. *United Nuclear Corp.*, No. 79-190, at 5-13 (reprinted as Appendix D to UNC's Motion to Dismiss or Affirm in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1360, at 196-204), sets forth in detail the process by which GAC first obtained a dismissal of I&M's action in the New York federal court on the representation that GAC sought a single trial in the New Mexico state court in which UNC, GAC and I&M would be bound, brought I&M into the pending New Mexico state action, expressly disclaimed any desire to arbitrate (even with UNC) any issues relating to I&M's contracts and then, when the trial was going badly for GAC, completely reversed its position and claimed, in the New Mexico Supreme Court and this Court, that I&M's judgment was invalid because trial of the I&M claims should have been stayed pending arbitration between UNC and GAC.

of the New Mexico Supreme Court, somehow violated this Court's decisions in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) ("*Felter I*") and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) ("*Felter II*"). It seeks this relief although it now has a pending appeal in the New Mexico Supreme Court making, *inter alia*, precisely the same attacks upon Judge Musgrove's order as it urges this Court to consider by extraordinary writ. This Court's Rule 26 clearly sets forth what needs to be shown to warrant an extraordinary writ:

> To justify the granting of any [extraordinary] writ . . . , it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

GAC has made no such showing.

GAC has itself recognized the narrow scope of this Court's review on mandamus. Indeed, GAC has repeatedly argued that statements in this Court's opinion in *Felter II*, recognizing the right of the Santa Fe court to continue the trial of the underlying action and to pass upon UNC's claim that GAC had waived its arbitration rights, are *obiter dicta* in view of the narrow scope of mandamus jurisdiction. *E.g.*, GAC's Petition for a Writ of Certiorari in *General Atomic Co.* v. *United Nuclear Corp.*, No. 79-190, at 19 n.16, 32-33 (reprinted as Appendix B to UNC's Motion to Dismiss or Affirm in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1360 at 34 n.16, 47-8); Transcript, Hearing before the Santa Fe court, December 23, 1980, at 183-84. But if, as GAC then urged, the decisions in *Felter I* and *Felter II* dealt only with the impropriety of a preliminary injunction barring resort to federal forums, the very narrow limits to

the reach of those decisions which GAC has posited preclude the exercise of mandamus jurisdiction with respect to Judge Musgrove's order, which clearly has no relation to such an injunction.[5]

Surely, if Judge Musgrove's order improperly overstepped what was needed to preserve the efficacy of the judgments of the New Mexico Supreme Court, that court is the proper forum of first instance to correct his decision, and GAC offers no convincing basis to warrant this Court's exercise of its extraordinary jurisdiction to involve itself in a question which the New Mexico Supreme Court has ample powers to determine in the ordinary course.

We oppose the motion to consolidate on the ground that the Mandamus Petition raises different and narrower issues than are presented by the Certiorari Petition (which issues are wholly and concededly irrelevant to I&M) and on the further ground that it would seem that the Certiorari Petition is without merit in view of familiar *res judicata* principles. *See, e.g., Durfee* v. *Duke,* 375 U.S. 106 (1963); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940); *Stoll* v. *Gottlieb,* 305 U.S. 165 (1938).

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[5] I&M reads *Felter II* more broadly than GAC as indicating that this Court recognized that the New Mexico courts had jurisdiction to try the suit, to determine such ancillary questions as whether GAC had waived its arbitration rights, and to enter judgment. Clearly, this reading would equally counsel against the appropriateness of mandamus here. We submit that it is not an unfair reading of this Court's decision on two occasions not to grant review of the judgments of the New Mexico Supreme Court, *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, *cert. denied*, 444 U.S. 911 (1979) and 1980-81 Trade Cases (CCH) ¶ 63, 639 (N.M. Sup. Ct., August 29, 1980), *appeal dismissed and cert. denied*, 101 S.Ct. 1966 (1981), that this Court found no impropriety in the decisions of the New Mexico courts sufficient to warrant a hearing. *See* Opinion of Judge Musgrove, Mandamus Petition App. A at 7a.

CONCLUSION

By reason of the foregoing, and of the arguments made in UNC's Brief in Opposition, with which we concur, we respectfully submit that the Petition for Mandamus and the motion to consolidate should be denied.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
ALBERT X. BADER, JR.
Counsel of Record for
Respondent Indiana & Michigan
Electric Company
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

SIMPSON THACHER & BARTLETT
Of Counsel.

July 14, 1981

APPENDIX

Parent: American Electric Power Company, Inc.

Affiliates and Subsidiaries:

American Electric Power Service Corporation
Appalachian Power Company
Beech Bottom Power Company, Inc.
Blackhawk Coal Company
Cardinal Operating Company
Cedar Coal Co.
Central Appalachian Coal Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Colomet, Inc.
Columbus and Southern Ohio Electric Company
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Indiana-Kentucky Electric Company
*Indiana & Michigan Electric Company
Kanawha Valley Power Company
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
Michigan Gas Exploration Company
Michigan Power Company
Ohio Power Company
Ohio Valley Electric Corporation
Price River Coal Company, Inc.
Simco Inc.
Southern Appalachian Coal Company
Southern Ohio Coal Company
Twin Branch Railroad Company
West Virginia Power Company
Wheeling Electric Company
Windsor Power House Coal Company

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* Respondent.

No. 80-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GENERAL ATOMIC COMPANY,

Petitioner.

On Petition for a Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

CHARLES D. OLMSTED
(Counsel of record)
MICHAEL R. COMEAU
LARRY D. MALDEGEN
WILLIAM P. TEMPLEMAN
BIGBEE, STEPHENSON,
CARPENTER, CROUT & OLMSTED
P. O. Box 669
Santa Fe, New Mexico 87501
(505) 982-4611

RICHARD T. CONWAY
JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D. C. 20036
(202) 828-2000

Counsel for Respondent
United Nuclear Corporation

July 16, 1981

QUESTION PRESENTED

Whether the judgment of the Santa Fe, New Mexico, trial court vacating certain arbitration awards, which judgment is now pending on appeal to the Supreme Court of New Mexico, violated this Court's opinions and mandates in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977), and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978).

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No. 80-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GENERAL ATOMIC COMPANY,

Petitioner.

On Petition for a Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

Respondent United Nuclear Corporation (UNC)[1] respectfully requests that this Court deny the petition for a writ of mandamus.

STATEMENT OF THE CASE

On January 9, 1981, the Santa Fe, New Mexico trial court vacated, pursuant to §10 of the Federal Arbitration Act, 9 U.S.C. §10, certain arbitration awards entered concerning a dispute between the parties over a uranium supply agreement (the 1973 Supply Agreement). Although that judgment is now pending on appeal in the New Mexico Supreme Court, General Atomic Company (GAC) filed on June 12, 1981, a petition for writ of mandamus, alleging that the trial court judgment violates the opinions and mandates of this Court in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) (*Felter I*), and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (*Felter II*). As we demonstrate below, nothing in the opinions or mandates of either of these decisions prevented the New Mexico trial court from

[1] United Nuclear Corporation is a subsidiary of UNC Resources, Inc., and it has no subsidiaries or affiliates within the meaning of Rule 28.1.

entering the judgment at issue. Indeed, essentially the same arguments by GAC were expressly rejected by this Court in *Felter II* and by the New Mexico Supreme Court in a judgment that this Court twice has refused to review.

The litigation between the parties growing out of the 1973 Supply Agreement is described at greater length in the Brief for Respondent in Opposition in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106 (hereinafter cited as "Br. Opp. No. 80-2106") and is more briefly summarized below.

In 1975, UNC sued GAC in the Santa Fe court to invalidate the 1973 Supply Agreement on grounds of fraud, economic coercion, breach of fiduciary duties, commercial impracticability, and violations of the New Mexico Antitrust Act. Rather than demanding arbitration and requesting a stay of proceedings pending arbitration (see 9 U.S.C. §3), GAC vigorously participated in the litigation.[2]

On April 2, 1976, the Santa Fe trial court issued a preliminary injunction restraining GAC "from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action," including "the institution or prosecution of * * * arbitration proceedings * * *." At the request of GAC, the injunction subjected UNC to the same restraint in regard to proceedings against GAC.[3] On its face, therefore, that injunction affected what the parties might do "in any other forum" but did not affect what they might do in the Santa Fe court. As that court later found, the "injunction did not prohibit GAC from

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[2] Another UNC-GAC contract involved in the litigation (the 1974 Supply Agreement) contained no arbitration clause. GAC joined Indiana & Michigan Electric Company (I&M) in the litigation. The GAC-I&M contract also contained no arbitration clause.

[3] The full language of the injunction is quoted in *Felter I*, 434 U.S. at 14 n.4.

demanding arbitration with UNC in this forum." (Ex. 11, pp. 4-5, Finding 13.)[4] Indeed, the concerns that gave rise to the injunction did not involve arbitration of the issues as to the validity and enforceability of the 1973 Supply Agreement; rather, the injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by certain utilities under arbitration clauses in their separate contracts with GAC. *Id.*

On certiorari to a decision of the New Mexico Supreme Court upholding the April 2, 1976 injunction, *General Atomic Co.* v. *Felter*, 90 N.M. 120, 560 P.2d 541 (1977), this Court reversed in its *Felter I* decision. *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977). The Court held that the Supremacy Clause, as construed in *Donovan* v. *Dallas*, 377 U.S. 408 (1964), prohibits a state court from enjoining a party from initiating subsequent *in personam* actions in federal forums or invoking federal rights. The Court did not hold or intimate that the New Mexico courts lacked jurisdiction to proceed with the case brought by UNC or that GAC had a right to arbitrate; rather, the case was remanded to the New Mexico courts "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

GAC had not requested a stay of the proceedings in the trial court pending review of the April 2, 1976 injunction and had continued its active participation in those proceedings throughout that review and after receipt of the mandate in *Felter I*. It was not until more than 19 months after April 2, 1976, that GAC finally demanded arbitration and moved for a

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[4] Three sets of exhibits were filed by UNC in the proceeding below that culminated in the decision GAC attacks in its petition. Citations of the form "Ex. ..... " are to the set of 71 exhibits that had also been filed in the Southern District of California (see p. 10, *infra*); citations of the form "10/10/80 Ex. ..... " are to the set of 12 exhibits filed on October 10, 1980; citations of the form "12/23/80 Ex. ..... " are to the set of 79 exhibits filed on December 23, 1980.

stay of the court proceedings pending arbitration. During that period, the parties engaged in extensive discovery and motion practice and trial itself had been underway for about a month before GAC, on November 29, 1977, for the first time demanded arbitration under the 1973 Supply Agreement and, on November 30, 1977, filed its motion for a stay pending arbitration pursuant to 9 U.S.C. §3. (See Ex. 11, pp. 4-6, Findings 12-21; Br. Opp. No. 80-2106, pp. 4-6.)

Moreover, on May 5, 1976, GAC filed its "Answer as to all matters in which arbitration is not being sought by Defendant and as to all issues which the Court may deem unarbitrable" (Ex. 4, p. 1), and counterclaimed against UNC. The eighth defense of the answer (Ex. 4, pp. 22-23) contained GAC's only additional mention of arbitration. It included allegations that "some" unspecified "issues in this case are subject to arbitration pursuant to Article XVII" of the 1973 Supply Agreement; that certain utility companies had demanded arbitration under their contracts with GAC; and that UNC's "obligations to General Atomic may be affected" by those utility arbitration proceedings. GAC went on in its eighth defense to state that it "demands arbitration" of "only" those issues which GAC might ultimately be required to arbitrate with the utility companies, but added:

> "Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement."

The utility contracts under which GAC's answer demanded arbitration with UNC were the utility contracts involved in the judicial and arbitration proceedings which provided the occasion for the April 2, 1976 injunction. By thus demanding arbitration with UNC in regard to issues to be arbitrated with the utilities under those separate contracts, GAC made unmistakably clear that it did not regard the April 2 injunction as preventing it from

demanding arbitration with UNC. GAC made equally clear that it renounced any intention to arbitrate under the 1973 Supply Agreement by expressly excluding from its arbitration demand all other arbitrable issues, "including any concerning the validity and enforceability of" that Agreement. Moreover, GAC's election to litigate, rather than arbitrate, the issues relating to the 1973 Supply Agreement was confirmed by its counterclaim, which requested the court to specifically enforce that Agreement and award over $2 billion actual and punitive damages for its breach and for UNC's alleged violation of the New Mexico antitrust laws, without any reference to arbitration. (Ex. 11, p. 3, Finding 9.)

In response to a UNC motion, the trial court, on December 16, 1977, entered a partial final judgment enjoining arbitration (Ex. 9), and, on December 27, 1977, the court entered a partial final judgment denying GAC's motion for a stay of the trial pending arbitration (Ex. 12). On the basis of extensive findings the trial court concluded, *inter alia*, that it had jurisdiction under both the federal and state arbitration acts "to determine whether GAC may properly demand arbitration with UNC"; that "GAC has waived any rights to demand arbitration from UNC and has been in default in exercising these purported rights"; that "the issues arising under the New Mexico Antitrust Laws * * * may not be submitted to arbitration"; and that "[a]ll issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration." (Ex. 11, pp. 8-9, Conclusions 1, 2, 7 and 8.)

GAC petitioned this Court for a writ of mandamus to the trial court to set aside *both* the December 16 and the December 27, 1977 judgments on the ground that they violated the opinion and mandate in *Felter I*. On May 30, 1978, this Court issued its *per curiam Felter II* opinion granting GAC's petition insofar as it requested that the December 16, 1978 judgment be vacated. *General Atomic Co.* v. *Felter*, 436 U.S. 493. In so doing, the Court concluded that only the December 16 judgment violated

Felter I, which "held that [the Santa Fe court] lacked the power to * * * interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. Thus, the Court did not hold that GAC had a right to arbitration, but only that the Santa Fe court could not enjoin "attempts" by GAC to assert in federal forums its "views" in that regard.

Moreover, *Felter II* did *not* hold that the New Mexico court lacked jurisdiction to proceed after issuing the April 2, 1976 injunction invalidated in *Felter I* or to make determinations as to arbitrability in its further proceedings. To the contrary, the Court denied GAC's petition insofar as it also sought vacation of the December 27, 1977 judgment denying GAC's request for a stay pending arbitration, since that judgment did not prevent "GAC from pursuing its arbitration claims in other forums" (436 U.S. at 498 n.2), and also because:

> "Clearly, our prior opinion did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

The New Mexico Supreme Court invited the parties to submit their views as to the effect of *Felter II* upon the then-pending appeal from the December 27, 1977 judgment. (Ex. 24, pp. 29-30.) GAC urged that the trial court's actions and judgments after April 2, 1976, violated the mandates of the *Felter* decisions and thus were void and *coram non judice*. (Ex. 26 & 30.) But on May 7, 1979, the New Mexico Supreme Court affirmed the December 27, 1977 judgment in all respects. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (1979). Among other things, that court held that the April 2, 1976

injunction never prohibited GAC from moving the trial court for a stay pending arbitration or otherwise asserting in that court a demand for arbitration, and that the denial of GAC's motion for a stay pending arbitration was not in violation of or inconsistent with the *Felter* decisions. 597 P.2d at 303-05, 309. GAC petitioned for writ of certiorari (No. 79-190) contending, among other things, that the April 2, 1976 injunction had unconstitutionally barred it from demanding arbitration and that the December 27, 1977 judgment violated the *Felter* decisions in barring its right to arbitrate. GAC's petition was denied. *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911 (1979).

On March 27, 1978, the Santa Fe trial court entered an Amended Sanctions Order and Default Judgment in favor of UNC against GAC by reason of GAC's utmost bad faith in refusing to comply with discovery orders. (Ex. 18.) And, in an April 4, 1978 judgment based thereon, the trial court declared that the 1973 Supply Agreement violated the New Mexico antitrust law, "is null, void, unenforceable and of no effect whatever" and "performance thereunder is excused." (Ex. 19.) On August 29, 1980, the New Mexico Supreme Court affirmed in all material respects. *United Nuclear Corp.* v. *General Atomic Co.*, ... N.M. .... , ... P.2d .... , 1980-81 Trade Cases (CCH) ¶63,639. GAC's appeal to this Court (No. 80-1360) sought review not only of that August 29, 1980 judgment but also of the prior May 7, 1979 judgment of the New Mexico Supreme Court, again contending that the proceedings after April 2, 1976, violated the *Felter* decisions. This Court dismissed the appeal for want of jurisdiction and, treating the jurisdictional statement as a petition for writ of certiorari, denied certiorari. *General Atomic Company* v. *United Nuclear Corporation*, 49 U.S.L.W. 3787 (April 20, 1981), *rehearing denied*, 49 U.S.L.W. 3912 (June 8, 1981). (See Br. Opp. No. 80-2106 at 8-9.)

Although arbitration of the 1973 Supply Agreement disputes was never ordered by any court, and despite the judgments of the New Mexico courts that arbitration had been waived by GAC

and no issues were arbitrable in any event as they consisted of inarbitrable antitrust issues or were inextricably entwined therewith, on July 26, 1978, the American Arbitration Association notified UNC that it would proceed with arbitration and directed UNC to appoint its arbitrator. While UNC did so under protest, and participated under protest in the arbitration proceedings for the limited purpose of contesting the jurisdiction of the arbitrators, when the arbitrators decided to hold hearings on nonjurisdictional issues UNC withdrew from the proceedings.[5]

On November 14, 1979, a majority of the arbitration panel entered a partial award concluding that (1) the New Mexico judgments are "not res judicata and they are not entitled to full faith and credit" because the actions of those courts after the April 2, 1976 injunction were *coram non judice* by reason of the *Felter* decisions (12/23/80 Ex. 43 at p. 28), and (2) GAC had not waived its right to arbitrate (*id.* at pp. 29-37). And, on September 10, 1980, without the presence of UNC or a UNC-appointed arbitrator, the panel entered a final award. (12/23/80 Ex. 62.) In that award, the two remaining arbitrators accepted GAC's *ex parte* case of contract breach, purported to pass upon UNC's antitrust claims and concluded that there was no showing of antitrust violation,[6] awarded damages to GAC in the amount of $301,181,635, and ordered UNC to specifically perform certain provisions of the 1973 Supply Agreement.

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[5] See, *e.g.*, Ex. 33, 36, 41, & Ex. 43, pp. 347-350. Actions brought by UNC in the federal courts to enjoin the arbitration were dismissed for lack of subject matter jurisdiction. (See Ex. 32, 35, 46, 51-53; Br. Opp. No. 80-2106 at 10 n.5.) UNC's participation in the arbitration proceedings under protest did not waive its right to raise its contentions regarding arbitrability in the courts. *E.g.*, *International Bhd. of Teamsters* v. *W. Pa. Motor Carriers Ass'n*, 574 F.2d 783 (3d Cir.), *cert. denied*, 439 U.S. 828 (1978); *Local 719, Am. Bakery & Confectionery Workers* v. *National Biscuit Co.*, 378 F.2d 918, 921-22 (3d Cir. 1967).

[6] By contrast, the Santa Fe court, in the judgment that is now final, found as a fact that GAC and Gulf Oil Corporation (one of GAC's two constituent partners) had "participated in the formation and operation of an international conspiracy and cartel of uranium producers." (Ex. 18 at p. 18.) Moreover, in May 1978, Gulf Oil pleaded *nolo contendere* to a federal criminal antitrust

On June 9, 1980, UNC filed a First Petition for Supplemental Relief in the Santa Fe trial court requesting that the partial award be vacated. And, on September 15, 1980, UNC filed in that court its Second Petition for Supplemental Relief and Application to Vacate Arbitration Award, which requested vacation of the final award pursuant to 9 U.S.C. §10 and incorporated by reference the First Petition for Supplemental Relief. On October 10, 1980, GAC removed that proceeding to the United States District Court for the District of New Mexico. (12/23/80 Ex. 66.) On December 11, 1980, that court granted UNC's motion to remand for lack of subject matter jurisdiction. (12/23/80 Ex. 77 & 78.)

Following the remand, the Santa Fe court, after further proceedings, issued on January 9, 1981, the opinion, decision and judgment which GAC seeks to have reviewed by this extraordinary writ proceeding. (Pet. 1a-16a.) Among other things, the court concluded (Pet. 2a-3a, 14a) that it had jurisdiction to review the arbitration awards under §10 of the Federal Arbitration Act, 9 U.S.C. §10, and vacated those awards as being "illegal, void and of no effect" as the arbitrators had exceeded their jurisdiction and powers and acted in manifest disregard of the law (Pet. 13a). In so ruling, Judge Musgrove relied upon the prior judgments upheld in the May 7, 1979 and August 29, 1980 judgments of the New Mexico Supreme Court, as to which this Court had denied review, holding those judgments to be the law of the case and *res judicata* on the issues decided therein. (Pet. 5a-8a, 13a.) On February 5, 1981, GAC appealed to the New Mexico Supreme Court, where its appeal is pending.

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information relating to those cartel activities. *United States* v. *Gulf Oil Corporation*, Criminal No. 78-123 (W.D. Pa.). In any event, the authorities are unanimous that antitrust issues are for the courts — not arbitrators — to decide. *E.g.*, *Applied Digital Tech., Inc.* v. *Continental Cas. Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Cobb* v. *Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821, 825-28 (2d Cir. 1968).

In the meantime, GAC filed applications to confirm the arbitration awards in the United States District Court for the Southern District of California and in the Superior Court of the State of California for the County of San Diego. The federal action was dismissed for lack of subject matter jurisdiction and is now pending on appeal by GAC to the United States Court of Appeals for the Ninth Circuit, which heard oral argument on June 2, 1981. The action in the San Diego state court was dismissed for lack of *in personam* jurisdiction, pursuant to a peremptory writ issued by the California Court of Appeal, Fourth Appellate District, which is the subject of GAC's petition for writ of certiorari now pending in No. 80-2106. (See Br. Opp. No. 80-2106 at 12-13.)

SUMMARY OF ARGUMENT

The issuance of an extraordinary writ of mandamus to review a judgment of the Santa Fe trial court which is subject to direct review on a pending appeal plainly is not appropriate, as GAC appears to concede (Pet. 13), unless that judgment violates the opinions and mandates of this Court in the *Felter* cases. As we shall demonstrate, the instant judgment of the Santa Fe court clearly did not violate the opinions and mandates of either *Felter I* or *Felter II*. While those cases held that the Santa Fe court could not issue orders enjoining or restraining GAC from attempting to pursue its arbitration claims in federal forums, neither of them held that GAC had a right to arbitrate or that the Santa Fe court lacked jurisdiction to proceed to judgments adverse to the merits of GAC's arbitration claims, such as the instant judgment vacating the arbitration awards. Rather, *Felter II* is expressly to the contrary in holding that a judgment by the Santa Fe court finding that GAC had waived its arbitration rights and that no issues were arbitrable did not violate *Felter I*. Furthermore, this Court has already denied review of the affirmance by the New Mexico Supreme Court of that judgment and of a subsequent judgment holding the 1973 Supply Agreement, including its arbitration clause, to be null, void,

unenforceable and of no effect whatever, even though GAC's requests for review included essentially the same arguments as it advances here.

ARGUMENT

A. An Extraordinary Writ Plainly is Not Appropriate If the Judgment Below Did Not Violate the Opinions and Mandates of the Felter Cases

Rule 26 of this Court succinctly states that:

> "The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

The judgment by the Santa Fe trial court which GAC seeks to have reviewed by an extraordinary writ of mandamus is now pending on appeal before the New Mexico Supreme Court. GAC can obtain "adequate relief" from that court if entitled thereto, and its judgment will be reviewable by this Court on petition for writ of certiorari if adequate grounds should exist. Under ordinary circumstances, therefore, it would seem clear that this Court should not allow this petition for an extraordinary writ to substitute for that appeal. *E.g., Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953).

Nonetheless, we perforce are cognizant of this Court's *Felter II* decision which, among other things, granted an extraordinary writ to correct a perceived violation by the Santa Fe court of this Court's mandate in *Felter I*, stating that "if a lower court

'mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled * * * by a writ of mandamus to execute the mandate of this Court.' " 436 U.S. at 497, quoting from *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425 (1978). But, an "inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court * * * ." *Ex parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900).[7] This also is the teaching of *Felter II*, which, as we demonstrate below, granted GAC's petition for writ of mandamus as to one judgment by the Santa Fe court, but denied it as to another judgment by that court which did not violate the *Felter I* mandate.

B. The Opinions and Mandates of the Felter Cases Do Not Preclude the Santa Fe Court from Reviewing the Arbitration Awards

In *Felter I*, this Court had before it an April 2, 1976 preliminary injunction issued by the Santa Fe court which restrained both GAC and UNC from "filing or prosecuting any other action or actions * * * in any other forum relating to * * * the subject matter of this action," including "arbitration proceedings * * * ." 434 U.S. at 14 n.4. While this Court held that the injunction violated the Supremacy Clause insofar as it enjoined the parties from proceeding in federal forums, the Court neither held nor suggested that GAC had a right to arbitrate or that the Santa Fe court lost jurisdiction to proceed in the case before it. Rather, this Court applied the doctrine of *Donovan* v. *Dallas*, 377 U.S. 408, 412 (1964), which expressly acknowledged that, while state courts cannot enjoin proceedings in federal courts, both state and federal courts " 'may proceed with the litigation at least until judgment is obtained in one of them which

[7] See also, *e.g.*, *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939); *Ex parte Century Indemnity Co.*, 305 U.S. 354 (1938); *In re Potts*, 166 U.S. 263, 265-66 (1897); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895).

may be set up as *res judicata* in the other,' " quoting *Princess Lida* v. *Thompson*, 305 U.S. 456, 466 (1939). See 434 U.S. at 15-19. And, the Court remanded the case to the Santa Fe court "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

Accordingly, GAC had no basis to complain about the Santa Fe court's exercise of jurisdiction in the case before it prior to the filing of a timely motion for a stay of proceedings pursuant to §3 of the Federal Arbitration Act (9 U.S.C. §3).[8] Even though never prohibited from doing so, as the New Mexico courts expressly held, GAC did not file such a motion until almost two years after commencement of the New Mexico litigation, including very extensive discovery and other pretrial proceedings and the commencement of the trial itself. See pp. 2-7, *supra*. Indeed, while GAC's answer to the complaint demanded arbitration with UNC under separate contracts between GAC and several utility companies, GAC specifically excluded from its demand "all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement," and counterclaimed for enforcement of that Agreement. See pp. 4-5, *supra*.

Upon the basis of findings that GAC by such inconsistent litigation activities thereby had waived any right to arbitrate under the 1973 Supply Agreement and thus was in default of arbitration under §3 of the Federal Arbitration Act, and also that all issues were inarbitrable antitrust issues or inextricably entwined therewith, the Santa Fe court entered two partial final judgments: one dated December 16, 1977, staying arbitration,

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[8] A "court has jurisdiction to litigate a contract, despite * * * an arbitration clause," and the "remedy of the party claiming [arbitration] * * * is a stay of proceedings until it has been had or a default in pursuing the arbitration is shown. 9 U.S.C.A. §3 * * *." *William S. Gray & Co.* v. *Western Borax Co.*, 99 F.2d 239, 240 (9th Cir. 1938). See, *e.g.*, *The Anaconda* v. *Am. Sugar Refining Co.*, 322 U.S. 42, 44 (1944); *Demsey & Associates* v. *S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972); *United Electrical, Radio & Machine Workers* v. *Oliver Corp.*, 205 F.2d 376, 385 (8th Cir. 1953).

and a second dated December 27, 1977, denying GAC's motion to stay the Santa Fe proceedings pending arbitration. See p. 5, *supra.*

In *Felter II*, GAC petitioned this Court for a writ of mandamus to review both judgments, contending that both violated the mandate of *Felter I*. While this Court granted that petition as to the December 16, 1977 judgment staying arbitration, since it "interfere[d] with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration," 436 U.S. at 496, the Court denied that petition as to the December 27, 1977 judgment denying GAC's motion for a stay of trial proceedings pending arbitration, since it did not "restrict[] GAC from pursuing its arbitration claims in other forums." 436 U.S. at 498 n.2. "Clearly, our prior [*Felter I*] opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

So, too, the January 9, 1981 judgment of the Santa Fe court that is the subject of the instant petition does not enjoin or otherwise restrict GAC "from pursuing its arbitration claims in other forums," or "bar" GAC from making any assertions it pleases in any "federal forum" it chooses concerning its "views" in regard to "its entitlement to arbitration" or as to the validity of the arbitration awards. Indeed, GAC has done so (although unsuccessfully) without let or hindrance from the Santa Fe court. See p. 10, *supra.* And, it is equally clear that this Court's *Felter* opinions "did not preclude the [Santa Fe] court from making findings concerning" the validity of the arbitration awards or from vacating those awards on the basis of such findings. Those matters were not before this Court in either *Felter* case, and *Felter II* establishes beyond question that the Santa Fe court

retained jurisdiction to proceed to a conclusion in the case before it.[9] In short, as Judge Musgrove recognized, the *Felter* "decisions were quite straightforward: a state court cannot deny a party access to federal forums"; but "[t]here is a vast difference between a right to access to a forum and a right to the relief sought in that forum." Pet. 7a.

The essence of GAC's argument here is that the Santa Fe court has interfered with or restricted GAC's right to assert its arbitration claims in a federal forum by entering a judgment that is adverse to the merits of those claims, even though the court has not enjoined or otherwise restrained GAC from asserting those claims in a federal forum. See Pet. at 8-12. That is precisely the contention that this Court rejected in *Felter II*, in holding that the December 27, 1977 judgment denying GAC's motion for a stay pending arbitration did not violate the mandate of *Felter I*. While the trial court's determination in that judgment that GAC had waived arbitration and that the issues in any event were not arbitrable obviously was adverse to the merits of GAC's arbitration claims, that order did not restrict GAC from pursuing those claims in other forums, and thus did not violate the mandate of *Felter I*.

After *Felter II*, GAC pursued its appeal from the December 27, 1977 judgment of the Santa Fe court. In affirming that judgment on May 7, 1979, the New Mexico Supreme Court

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[9] It is well established that the state courts have the jurisdiction, and indeed the duty, to enforce and apply the substantive provisions of the Federal Arbitration Act to contracts subject to that Act. *Commercial Metals Co.* v. *Balfour, Guthrie & Co.*, 577 F.2d 264, 269 (5th Cir. 1978). See, *e.g.*, Wright, Miller & Cooper, 13 *Federal Practice and Procedure*, §3569 at 470 n.14 (1975) and cases there cited. *Cf. Gulf Offshore Co.* v. *Mobil Oil Corp.*, 49 U.S.L.W. 4920, 4921 (U.S., July 1, 1981). This was recognized by Judge Musgrove, who applied the standards specified in §10 of that Act in vacating the arbitration awards (Pet. 2a, 14a). While we are convinced that he applied those standards correctly, that is not a matter covered by the opinions and mandates in the *Felter* cases, and should be determined in GAC's pending appeal to the New Mexico Supreme Court. The same is true of GAC's argument that §10 of the Federal Arbitration Act prevented the New Mexico court from vacating an award entered in California (Pet. 13 n.9), although we note that the error of that argument is shown in Br. Opp. No. 80-2106 at 22-25.

rejected arguments by GAC that this denial on the merits of GAC's claimed right to arbitration was inconsistent with the *Felter* cases. See pp. 6-7, *supra*. In its unsuccessful petition to this Court for writ of certiorari to review that judgment (No. 79-190), GAC contended, among other things, in language similar to that used here, that (p. 24):

> "The judgment below perpetuates an injustice in this very important case by again interfering with, impeding, and frustrating GAC's access to federal arbitration — a right which GAC secured in this Court 'after a lengthy process of litigation, involving several layers of courts' (436 U.S. at 497), and which thereafter had to be enforced by this Court through the extraordinary procedure of mandamus. Meaningful implementation of this Court's two rulings requires reversal of the decision of the New Mexico Supreme Court because that decision threatens to achieve indirectly the same restriction against arbitration which this Court invalidated when the courts below attempted to impose it directly."

See also Pet. in No. 79-190 at 25-33, 36-38, and compare Brief for Respondent United Nuclear Corporation in Opposition in No. 79-190 at 22-24 and 31 n.29.

On August 29, 1980, the New Mexico Supreme Court affirmed a judgment of the Santa Fe court declaring the 1973 Supply Agreement — including its arbitration clause — to be "null, void, unenforceable and of no effect whatever"; that judgment was entered as a sanction for GAC's utmost bad faith in discovery. See p. 7, *supra*. GAC appealed to this Court (No. 80-1360), and in its jurisdictional statement, among other things, again requested the Court to review the May 7, 1979 decision of the New Mexico Supreme Court that the *Felter* decisions had not been violated. According to GAC, "Probable Jurisdiction Should Be Noted to Determine Whether a State Court Can Retain Jurisdiction to Proceed to Judgment by

Unconstitutionally Enjoining a Defendant from Exercising Its Federally Guaranteed Right of Access to Another Tribunal" (J.S. in No. 80-1360 at 23; generally, at 23-25). Compare Motion of United Nuclear Corporation to Dismiss or Affirm in No. 80-1360 at 22-25. This Court dismissed GAC's appeal for want of jurisdiction and, treating the jurisdictional statement as a petition for certiorari, denied certiorari. 49 U.S.L.W. 3787 (April 20, 1981).

In view of the grant of an extraordinary writ in *Felter II* to correct a violation of this Court's mandate in *Felter I*, it is hardly conceivable that the Court would have denied direct review of the foregoing judgments — both of which plainly were adverse to the merits of GAC's arbitration claims — if the Court had agreed with GAC's arguments based upon the *Felter* decisions. Certainly, if those arguments did not warrant direct review, their renewal here does not warrant the issuance of an extraordinary writ. Indeed, the judgment by the Santa Fe court now sought to be reviewed was primarily based upon those prior judgments which this Court declined to review. See Pet. 5a-8a, 13a. In baseball, after three strikes one is out. But however that may be, certainly GAC is not entitled to an extraordinary writ of mandamus to present to this Court for a fourth time arguments that this Court expressly rejected in *Felter II* and refused to review on two subsequent occasions. GAC's instant petition is entirely without merit and should be summarily rejected.

CONCLUSION

For the reasons stated above, the petition for an extraordinary writ of mandamus should be denied.

Respectfully submitted,

Charles D. Olmsted
(Counsel of record)
Michael R. Comeau
Larry D. Maldegen
William P. Templeman
Bigbee, Stephenson,
Carpenter, Crout & Olmsted
P. O. Box 669
Santa Fe, New Mexico 87501
(505) 982-4611

Richard T. Conway
John Townsend Rich
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Respondent
United Nuclear Corporation

July 16, 1981

Office-Supreme Court, U.S.
FILED
AUG 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GENERAL ATOMIC COMPANY,
Petitioner.

On Petition for a Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

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PETITIONER'S REPLY BRIEF

NATHAN LEWIN
(*Counsel of Record*)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D. C. 20037
(202) 293-6400

JOHN D. ROBB
JOHN P. EASTHAM
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Albuquerque, NM

Attorneys for Petitioner

Of Counsel:

MONTGOMERY & ANDREWS, P.A.
Santa Fe, NM

GRAY, CARY, AMES & FRYE
San Diego, CA

HOWREY & SIMON
Washington, D.C.

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PETITIONER'S REPLY BRIEF

The sole issue presented by GAC's Petition for a Writ of Mandamus is whether the most recent interference by the Santa Fe court with the federal arbitration conducted in San Diego was a violation of this Court's mandates in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) (*"Felter I"*) and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (*"Felter II"*). If the decision and order of January 9, 1981, declaring that "[t]he arbitrators had no jurisdiction to issue an award" and vacating the arbitration award on that basis as "illegal, void and of no effect" (Pet. App. 13a) was functionally equivalent to the Santa Fe court's "stay" order of December 16, 1977, which resulted in *Felter II*, GAC is entitled to a writ of mandamus. The fact that GAC is also pursuing an appeal to the New Mexico Supreme Court in which this issue, among

others, is raised does not affect the validity of our request for mandamus. This Court noted in *Felter II* that it would be wrong to require GAC to exhaust "a lengthy process of litigation, involving several layers of courts" in order "to obtain execution of the judgment of this Court." 436 U.S. at 497. The same conclusion applies to the Santa Fe court's 1981 order as applied to its 1977 order.

This Court declared in *Felter II* that the Santa Fe court's December 1977 "stay" of arbitration had done "precisely" what *Felter I* said the Santa Fe court could not do: "interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496 (footnote omitted). *Felter I* had not declared that only an injunction against arbitration was prohibited by the Supremacy Clause. It had prohibited "interference" by the Santa Fe court "for any reason . . . whatsoever" with the assertion of federal arbitration rights. The term "interfere" was used again when this Court said that "the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums . . ." (436 U.S. at 497). A "stay" of arbitration was "precisely" what had been prohibited in *Felter I* because it constituted "interference."

To be sure, this Court noted in *Felter II* what its "prior opinion" and "prior decision" had *not* prevented. The Court said that *Felter I*—the "prior opinion" and "prior decision"—did not preclude the "making" of findings by the Santa Fe court on the issue of waiver or on the existence of an agreement to arbitrate. Nor did *Felter I* prevent the Santa Fe court from proceeding with its own trial "pending arbitration in other forums." 436 U.S. at 497. These observations as to the precise holding of *Felter I* were not approvals or affirmances of actions of the Santa Fe court; they merely described precisely the mandate of this Court which GAC was endeavoring to enforce with the Petition which resulted in *Felter II*. This Court's jurisdiction on a writ of mandamus was limited to enforcement of its prior mandate, which prohibited "interfer-

ence" in any form and for any reason. It was, therefore, appropriate for the Court to define with particularity what the earlier mandate had said and to grant the requested writ only to the extent that its prior mandate required.

The order of December 27, 1977, was deemed not to constitute "interference" with the federal arbitration, and it could not, therefore, be reached with a writ of mandamus. This Court explicitly noted that fact in footnote 2 of *Felter II*, wherein it said that there was "no occasion to disturb" the order of December 27—which had only allowed the Santa Fe trial to continue—because this Court did not read that order "as restricting GAC from pursuing its arbitration claims in other forums." 436 U.S. at 498, n. 2. Whether or not the Santa Fe trial proceeded on its schedule did not affect GAC's ability to arbitrate the contract issues which it had finally been permitted to bring to arbitration.

If, however, the December 27 order had gone beyond a mere refusal to stay the Santa Fe trial—if, for example, it had incorporated a declaratory judgment stating that the arbitrators had "no jurisdiction to issue an award" and no "powers" other than "to dismiss the proceedings" and that any federal arbitration held thereafter was for that reason "illegal, void and of no effect"—this Court would, we submit, have concluded that the order did "restrict" GAC from pursuing its arbitration claims and did "interfere" with that right. In that event the State-court order nullifying the arbitration in advance would have been the functional equivalent of a "stay" of arbitration and would properly have been the subject of a writ of mandamus. For, as this Court noted in *Samuels* v. *Mackell*, 401 U.S. 66, 72-73 (1971), a declaratory judgment invalidating a proceeding in another forum "has virtually the same practical impact as a formal injunction would."[1]

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[1] *Samuels* v. *Mackell*, 401 U.S. 66 (1971), concerned the validity of a federal declaratory judgment relating to the constitutionality of a State-court prosecution. Using the term "interference" (which is critical here) this Court said that "ordinarily a declaratory judgment will result in pre-

What the Santa Fe court did on January 9, 1981, was tantamount, in every respect, to a declaratory judgment issued prior to the arbitration declaring it to be null and void. The January 1981 order "vacates" the arbitration award (a patent "interference" with a federal arbitration held in another jurisdiction) entirely on the ground that the arbitrators never had "jurisdiction" or "powers" to proceed. This is not the judicial "review" contemplated by Section 10 of the Federal Arbitration Act; it is a New Mexico court's forcible capture of a California-based arbitration guaranteed by federal law and the entry of an order designed to nullify *ab initio* the work of the arbitration panel without regard to anything that occurred during the course of that proceeding.

Indeed, even UNC recognized that the "significance" of this Court's prior decisions in *Felter I* and *Felter II* was that "claims of *res judicata* (or full faith and credit, for that matter) must be pressed before the tribunal where the suit pends (which UNC is doing with this [Arbitration] Panel). . . ."[2]

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cisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." 401 U.S. at 72. This Court went on to say (401 U.S. at 73):

> Ordinarily . . . the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction.

[2] In its Memorandum of Position filed with the Arbitration Panel on January 15, 1979, UNC said:

> The significance of the U.S. Supreme Court opinions concerning the disputes between UNC and GAC is apparent in light of the case of *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964) which holds that claims of *res judicata* (or full faith and credit, for that matter), must be pressed before the tribunal where the suit pends (which UNC is doing with this Panel) and may not be enjoined by another court.

And UNC told the Panel on March 27, 1979, during oral argument at an arbitration hearing in San Diego:

> Mr. Olmsted: Obviously. I think you have the jurisdiction and the

It thus conceded that a judgment that the arbitrators had no "jurisdiction" could not be squared with this Court's prior mandates.

The Santa Fe court's lack of authority to interfere with the federal arbitration is not cured or corrected by any of the facts alleged in UNC's Brief in Opposition. These facts are fundamentally irrelevant to the issue presented by this Petition—which is whether the Santa Fe court's latest order violates this Court's mandates. In addition, many of UNC's recitations are misleading or false. In particular, UNC makes a determined effort to have this Court believe that GAC elected to litigate in the Santa Fe court rather than to arbitrate its dispute with UNC, supporting this suggestion by implying that the Santa Fe case was begun by UNC in mid-1975 and that GAC deliberately refrained from demanding arbitration until November 29, 1977 (UNC Br. in Opp., pp. 2-4). The majority of the arbitrators rejected this factual assertion in their Partial Award (Petition for a Writ of Certiorari, No. 80-2106, pp. 48-54a). Several key facts which UNC has omitted, some of which were cited by the arbitrators, are the following:

(1) That the unconstitutional injunction against arbitration was first removed on November 28, 1977, and on the next day GAC's demand for arbitration was filed;

(2) That in the pleadings leading to this Court's decision in *Felter II*, GAC emphasized its right to arbitrate and the fact that the unconstitutional injunction interfered with that right;

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power to decide whether [the pre-arbitration rulings of the Santa Fe Court] are res judicata.

* * *

Judge Bratton [of the United States District Court for the District of New Mexico] said the panel should decide the full faith and credit claims of United Nuclear . . . . You do have the power, you have the jurisdiction . . . .

(3) That the Santa Fe judge's authorization of arbitration with UNC "in this forum [*i.e.*, Santa Fe]"—on which UNC relies—would have subjected GAC to supervision and review of the arbitration by the very judge to whose jurisdiction GAC objected and would have deprived GAC of its federal right to demand arbitration in other locales;

(4) That the unconstitutional injunction of April 2, 1976, was issued before GAC was required to serve its answer—*i.e.*, before the earliest juncture when an election between arbitration and litigation is required under federal law;

(5) That in virtually all pleadings filed before April 2, 1976, GAC expressly reserved its right to arbitrate; and

(6) That the Santa Fe action was begun not in mid-1975—when a predecessor lawsuit removable to federal court was instituted by UNC—but on the very last day of 1975, after UNC voluntarily dismissed its earlier action to avoid federal jurisdiction.

As the arbitrators found, GAC never voluntarily chose to litigate in Santa Fe (see Petition for a Writ of Certiorari, No. 80-2106, pp. 48a-54a). It made various efforts to bring the dispute into a more neutral forum such as a federal court. When those efforts failed on technical grounds, GAC indicated its preference for arbitration. An unconstitutional order of the Santa Fe court then aborted the arbitration, and all the subsequent restrictions upon the arbitration are a direct consequence of that order. This Court's mandate that the New Mexico courts may not interfere with the federal right was squarely violated by the "stay" of December 16, 1977, and it is equally violated by the order declaring that the arbitrators never had "jurisdiction to issue an award," and "vacating" the arbitration award dated January 9, 1981.

Finally, it is apparent that the validity of the January 9, 1981, order was not an issue in any prior petition for review filed in this Court. UNC's claim that this Petition presents an argument "rejected in *Felter II*" is plainly erroneous (see pp. 2-3, *supra*), as is its related assertion that the same issue

was raised in GAC's previous petitions. See our Reply Brief in No. 80-2106, at pp. 9-10. In no prior case was this Court presented with the question whether the same State tribunal which was forbidden to enjoin or stay a federal arbitration could enter an order "vacating" the arbitration award on the ground that its own decisions had deprived the arbitrators of all "jurisdiction" and "powers."

CONCLUSION

For the foregoing reasons, as well as those stated in our Petition, this Petition for a Writ of Mandamus should be consolidated and set for briefing and oral argument with No. 80-2106.[3]

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D. C. 20037
(202) 293-6400

JOHN D. ROBB
JOHN P. EASTHAM
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Albuquerque, NM
Attorneys for Petitioner

Of Counsel:

MONTGOMERY & ANDREWS, P.A.
Santa Fe, NM

GRAY, CARY, AMES & FRYE
San Diego, CA

HOWREY & SIMON
Washington, D.C.

August 1981

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[3] The issue presented on this Petition does not affect Indiana & Michigan Electric Company because it involves only the validity of an arbitration award to which Indiana & Michigan was not a party.